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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 644

HENRY HITT, TRADING AS CONGRESSIONAL GARAGE, AND CENTURY INDEMNITY COMPANY, PETITIONERS

v.

FRANK A. CARDILLO, DEPUTY COMMISSIONER FOR THE DISTRICT OF COLUMBIA, UNITED STATES EMPLOYEE'S COMPENSATION COMMISSIONER, AND WANDA V. HERLINGER, INTERVENER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 17) is not reported. The opinion of the Court of Appeals for the District of Columbia (R. 19–22) is reported in 131 F. (2d) 233.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered

October 26, 1942 (R. 22). The petition for a writ of certiorari was filed January 11, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

(1) Whether the $7,500 maximum prescribed in Section 14 (m) of the Longshoremen and Harbor Workers' Compensation Act applies to combined disability compensation and death benefits which are payable under the Act as a result of the same injury, or applies separately to disability compensation and to death benefits.

(2) Whether, in a case where an employee injured by a third party elects to take disability compensation under the Act and the employer, pursuant to statutory assignment of the employee's right of action, recovers from the third party a sum exceeding the employee's compensation, the employer is entitled, under Section 33 (e) (1) (D), to offset the amount of such excess against death benefits subsequently accruing to dependents upon the employee's death.

(3) Whether, under Section 14 (k) of the statute, the amount of such excess which has actually been paid to the employee may be credited against the death benefits accruing to his dependents on his death.

STATUTES INVOLVED

The relevant provisions of the Longshoremen and Harbor Workers' Act are set forth in the Appendix.

STATEMENT

This case arises under the provisions of the District of Columbia Workmen's Compensation Act of May 17, 1928 (45 Stat. 600, 36 D. C. Code (1940) § 501), making applicable to employees in certain employments in the District of Columbia the Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U. S. C. §§ 901–950).

On July 31, 1934, Harrison Herlinger, an employee of petitioner Hitt, was accidentally injured through the fault of a third party (the Worcester Salt Company), when an automobile under which he was working in Hitt's garage, in the District of Columbia, fell upon him (R. 2, 5, 9, 10). Herlinger's injuries were severe and ultimately resulted in his death on September 5, 1939 (R. 10–11).

Prior to his death Herlinger elected to take disability compensation under the District of Columbia Workmen's Compensation Act, thereby assigning his cause of action against the Worcester Salt Company to petitioner Hitt, his employer, and by subrogation, pursuant to Sections 33 (a) (b) and (i) of the statute, to petitioner Century Indemnity Company, the insurance carrier (R. 11).

Petitioners sued the third party responsible for the accident and recovered the sum of $27,000, from which they paid Herlinger compensation until his death[1] (R. 11–12). In addition to compensation, petitioners paid to Herlinger the sum of $6,370.39 from the avails of the lawsuit, with most of which he purchased a home (R. 5, 11–12). At the time of Herlinger's death, after the carrier had deducted this advance, the compensation paid to Herlinger and "all expenses," it still held in trust for Herlinger the sum of $4,011.02 with accumulated interest (R. 12).

Upon Herlinger's death, his widow, the intervener here, filed claim for death benefits under section 9 of the law on behalf of herself and two minor children (R. 11). After a hearing, respondent Cardillo, the Deputy Commissioner, issued a compensation order awarding $200 as funeral expenses and compensation of $12.76 per week to the widow and $3.646 per week to each of the two minor children (R. 9, 11–13). Respondent also found that the sum of $4,011.02, the unexpended balance of the third party recovery in the hands of the insurance carrier, should be paid to Herlinger's legal representative, pursuant to section 33 (e) (2) of the statute (R. 12).

Petitioners then brought a proceeding in the United States District Court for the District of

[1] The record does not show the aggregate amount of this compensation, but petitioners state that it was $6,417.84 (Pet. 2).

Columbia for a review of the compensation order pursuant to section 21 (b) of the statute, seeking to enjoin its enforcement (R. 1–8). A joint motion by respondent and the intervener to dismiss the complaint was granted on August 4, 1941 (R. 14–17). The District Court held that the order was sustained by the evidence and in harmony with the pertinent judicial precedents (R. 17); its decision was affirmed by the Court of Appeals for the District of Columbia (R. 19–22).

ARGUMENT

(1) Section 8 of the Longshoremen's and Harbor Workers' Compensation Act accords "compensation for disability" to an employee who suffers injury in the course of his employment; and Section 9 confers "death benefits" upon certain specified dependents "if the injury causes death." Section 14 (m) provides:

> "The total compensation payable under this Act for injury *or* death shall in no event exceed $7,500." (Italics supplied.)

The decision of the court below that the $7,500 maximum applies separately to the disability compensation payable to an employee for an injury, under Section 8, and to the death benefits due to his dependents upon his death therefrom, under Section 9, is in harmony with the holding of the two circuit courts of appeals which have passed on the question. *International Mercantile Marine Co.* v. *Lowe,* 93 F. (2d) 663 (C. C. A. 2);

Norton v. *Travelers Insurance Co.*, 105 F. (2d) 122 (C. C. A. 3). In the *International Mercantile Marine* case, a petition for certiorari was filed and denied, 304 U. S. 565. That petition presented substantially the same arguments as are raised by petitioner on this phase of this case, and there are no circumstances which would impel the granting of a writ here to review that issue which were not present in the former case.

The decisions of the three courts ~~is~~ are supported by the literal language of the Act, for it cannot be assumed that the disjunctive "or" was used inadvisedly or was intended to have other than its normal meaning. Moreover, the structure of the Act shows that the employee, under Section 8, and his dependents, under Section 9, were to be given independent protection.

Petitioners urged that the word "injury" in Section 14 (m) should be construed in accordance with the definition in Section 2 (2) as meaning "accidental injury or death."[2] But in view of the fact that the phrase in Section 14 (m) is "injury or death," it is apparent that the word "injury" as used there was not intended to include "death."[3]

[2] This argument was made and rejected in the *Norton* case, *supra.*

[3] Insertion of the definition of injury in Section 14 (m) would cause that paragraph to read "The total compensation payable under this Act for accidental injury *or death* or death shall in no event exceed $7,500." Insertion of the definition of "death" found in Section 2 (11) would only add to the confusion. Obviously, in such circumstances, the words "injury" and "death" were intended to have their normal meaning in Section 14 (m).

That "injury" was often used in its normal sense, as distinguishable from death, is indicated by many other sections of the Act.[4] See §§ 5; 12 (a), (b) and (d); 13; 14 (b), (d) and (g); 19 (a); 30 (a), (c) and (f); 32 (b); 33 (f); cf. §§ 3 (a) and 33 (a).[5] The acceptance of petitioner's construction would open a wide gap in the protection provided for dependents whenever a lingering injury subsequently results in the employee's death.

2. Section 33 of the Act provides that if a person other than the employer is liable in damages for the injuries suffered, election by the employee to receive compensation under the Act acts as an assignment to the employer of the employee's right of action against the third person. The employer may institute proceedings for the recovery of such damages, and may retain from the amount recov-

[4] "Injury" is not the only word defined in the statute whose meaning must vary in accordance with the text in which it is used. The same is true of the word "compensation." See *Cardillo* v. *Liberty Mutual Ins. Co.*, 101 F. (2d) 254 (App. D. C.). Petitioners contend that the decision below conflicts with the *Liberty Mutual* case, but the Court of Appeals properly held that the latter decision supported its views rather than the contrary.

[5] For example, in connection with the notice required by Section 12 (a) within thirty days after "injury or death," § 12 (b) provides:

"Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf."

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ered a sum equal to the cost of the proceeding, all benefits or compensation previously paid, and, in a trust fund, to meet future payments "the present value of all amounts thereafter payable as compensation." Any "excess" remaining is to be paid over to the person entitled to compensation or to his representative.

From the proceeds of the $27,000 third party recovery, petitioners paid Herlinger, during his lifetime, the disability compensation owing to him under the act and an additional sum of $6,370. When he died, petitioners, after deducting "all expenses" still held "in trust" for Herlinger $4,011 of the "excess" proceeds owing to him. Petitioners contend that if they are required to pay an additional $7,500 as compensation for death, the proceeds of the third party recovery—that is, the $6,370 already paid and the $4,011 still due—may be availed of to satisfy the liability to his dependents.[6]

This argument is necessarily predicated on the assumption that an employee and his dependents do not have separate rights under the Act, and that

[6] This question has arisen in no other case, and because of its peculiar nature probably will not be sufficiently frequent to be of general importance. The problem would only arise where there was first disability, then death from the same injury, and in addition a third-party recovery in excess of the total compensation payable under the Act. That such cases are unusual is indicated by the testimony before the House Committee on the Judiciary on S. 3170, 69th Cong., 1st Sess., p. 162.

an employer's suit on behalf of a living employee also asserts the interest of the latter's dependents.[7] However, when the employee elects to take compensation, his personal right of action against a third person, and no more, is assigned to the employer by Section 33 (b). *Cf. Doleman* v. *Levine*, 295 U. S. 221. The right to death benefits is conferred by Section 9 exclusively upon dependents and, indeed, during the life of the employee is nonexistent or at most contingent. It accrues only if the employee's death results from the injury. The right may never arise or vest, depending not only upon the cause of death, but also upon the existence of eligible dependents. Cf. §§ 44 and 33 (c). Moreover, since any such right belonged to the dependents, and not the employee, it was not subject to assignment by him. It was thus not covered by Herlinger's assignment to the employer, and the latter is not authorized to credit recoveries on the employee's claim actually assigned to him against subsequent liability on the dependents' claim which was not.

Petitioners stress the language in Section 33 (e) (1) (D) permitting the employer to retain "the present value of all amounts thereafter payable as compensation." But, where the recovery is upon the employee's right of action, while he is still alive, the phrase "all amounts thereafter payable as

[7] This assumption would appear to be inconsistent with the cases cited on pp. 5–6, *supra*.

compensation" refers only to the compensation payable to the employee himself. This must follow from the requirement that the *"present value"* of the "compensation thereafter payable" be computed. As in the case at bar, it would ordinarily be impossible to determine at the time of the recovery against the third party whether the employee would die from the injury or from some other cause, upon which would depend his dependents' rights to any death benefits at all, and equally impossible to forecast the time of the employee's death, and consequently the number and relationship of his dependents at death, in accordance with which the amount and distribution of any death benefits due would vary. Congress could hardly have meant that the computation of the excess due to the employee from a third-party recovery should await his death, for in that case the employee would never personally obtain any of the excess. The Act obviously contemplated that he, and not his dependents, receive the excess computed as of the time of the employer's recovery. And petitioners' position can be no better simply because they still retained a portion of the excess at the time of Herlinger's death. When Herlinger died, his representative, not his dependents, was entitled to the excess under the specific wording of the Act.[8]

[8] Section 33 (e) (1) (D) and (2) provides that the payment shall be to "the person entitled to compensation" or to his "representative," not to the persons entitled to benefits under Section 9. This is in marked contract to the provision

Petitioners seek to avoid these difficulties by referring to the proviso in the District of Columbia Wrongful Death Act prohibiting an action thereunder by the representative "in any case when the party injured * * * has recovered damages therefor during the life of such party." That Act is not applicable here, in view of the definite provisions of the Longshoremen's and Harbor Workers' Compensation Act. Certainly, Congress would not have intended the availability of death benefits under the latter Act to depend upon the varying provisions of state or local wrongful death statutes.

There is no basis for petitioners' argument (Pet. pp. 14–15) that the decision below permits any double recovery of damages for the same liability. The common law recovery upon Herlinger's cause of action did not include the elements of his dependents' statutory death benefits. The only lost earnings for which he could sue were those occurring during his lifetime. The essence of the death benefits provided in the statute for dependents is the loss of the employee's earnings after his death.

Petitioners also urge that under Section 14 (k) the $6,370.39 of "excess" proceeds paid to the employee from the third party recovery constitute "advances" deductible from death benefits payable to his dependents. Section 14 (k) provides:

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that unpaid installments of disability compensation (other than total disability compensation which is payable "during the continuance" of total disability) shall be paid to his dependents upon the employee's death from causes other than injury. §§ 2 (d) and (i).

> If the employer has made advance payments of *compensation,* he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation *due.* (Italics supplied.)

This section is inapplicable both for the reasons advanced above and because a payment out of excess proceeds is not a payment of "compensation" within the meaning of the Act, but is payable in addition to compensation. Furthermore, when petitioners paid the $6,370 of excess proceeds to Herlinger, there were no unpaid installments of compensation "due" to his dependents, and it could not even be foretold whether any would ever be due to them. See pp. 9–10, *supra.*[9]

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[9] Petitioners apparently think it of some significance that Herlinger used the sum to buy a home which upon his death became the property of his wife. But this fact did not convert the payment into compensation under the Act. Its status would have been no different if Herlinger had spent the money during his lifetime for his own personal benefit, as he had a right to do.

CONCLUSION

The decision below was correct and there is no conflict of decisions. The petition for certiorari should be denied.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
K. NORMAN DIAMOND,
ROBERT L. STERN,
Attorneys.

CHRISTOPHER B. GARNETT,
HENRY H. GLASSIE, JR.,
Attorneys for Intervener.

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